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Salt Lake City v. Boundary Springs Water Users Association and Joseph M. Tracy : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

SALT LAKE CITY, a Municipal Corporation,
Plaintiff and Appellant,

— vs. —

BOUNDARY SPRINGS WATER USERS ASSOCIATION, a Corporation, JOSEPH M. TRACY, State Engineer of the State of Utah,
Defendants and Respondents.

Case No. 8058

Brief of Respondents

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STATEMENT OF FACTS

The Boundary Springs Water Users Association is a non-profit corporation organized by the owners of water rights in Mill Creek Canyon in the southeast part of Salt Lake County. The water rights are not in controversy. They were adjudicated in the case of Martha Young, administratrix, vs. William Gordon, Executor of the Estate of Daniel Lund, deceased, et al., in what is

known as the Morse Decree, signed by Judge Morse on the 1st day of August, 1913. If any of the rights so adjudicated have been lost by abandonment and acquired by adverse use, such issues are not before the court in this case.

By the Morse Decree, Exhibit 2, the right to the use of the quantity of water decreed to various individuals was designated as house use streams, and included in the Decree, there was listed the ditches and individuals entitled to that special use of the water. (Exhibit 2, beginning page 2.) The appropriation of the water by beneficial use was begun by dipping from the creek or ditches taken out of the stream. That was the practice until the controversy out of which this litigation arose.

Mill Creek Canyon is for the most part in the United States Forest Preserve and the Government has provided conveniences for recreation from one end of the canyon to the other. The stream runs in an open channel and is contaminated from various sources to the extent that the water is wholly unfit for culinary uses. It, therefore, became necessary for the owners of the water to provide water free from contamination.

At about one-half mile from the mouth of the canyon arises springs known as the Boundary Springs, which flow 3 or 4 second feet of water, free from contamination at the point where they arise. The owners of house streams decreed by the Morse Decree thought to provide sufficient of the pure water to meet their requirements

and accordingly, a large number of them organized the Boundary Springs Water Users Association, and by the Articles of Incorporation they subscribed, transferred to the corporation the full and complete right to divert the water from the springs into a pipeline and to convey it through the pipeline to a point of distribution among the owners for culinary, stock watering, lawn sprinkling and other domestic purposes. (Ex. 3, 4, 5, 6, 7 and 8.)

Pursuant to the arrangement, they caused Application No. 70 to be filed in the Office of the State Engineer for the transfer of the water decreed to them, to the lower water users or water users not joining in the association and the withdrawal from the Boundary Springs of an equal amount of uncontaminated water to be conveyed to them as stated. In the part of the application, under the heading "Explanatory," their purpose was stated as follows:

> It is the purpose of the applicant, a non-profit corporation, to divert the waters of Boundary Springs to the extent of *two* cubic feet per second, which water has heretofore commingled with waters of Mill Creek Stream as referred to in the Morse decree, and to convey it as indicated through a pipeline to a point approximately 1,000 feet East of the West quarter corner of Section 36, T. 1 W., R. 1 E., S. L. B. & M. and there divide among the owners for culinary purposes and in lieu of water so diverted to exchange for continuous flow in Mill Creek stream a quantity equal to water so diverted, and which has heretofore been conveyed through the open ditches named in paragraph 11.

Paragraph 11 is a rider added to the application and designates the ditches referred to in the Morse Decree as the Stillman-Russell Ditch, the Skidmore-Osguthorpe Ditch, the Chamberlain Ditch and the Stillman-Hussey Ditch. (Exhibit 1.)

At a pre-trial hearing, there was a discussion as to the issues in the case which resulted in the following statement:

> MR. HOLMGREN: . . . The chief proposition is that we have acquired this as a standby water right for the culinary use. Now, our chief objection is that the water of Boundary Springs has been discovered to be practically pure, free from contamination, whereas the creek flow becomes contaminated. (R. 24)

And further:

> I think, assuming that we have succeeded to a culinary right, then the question is, has the one water user, where there are several users in the creek, has he a right to go up and take the pure water out of the spring and leave the contaminated water to the other regardless of the degree of contamination? Any degree, slight or great. (R. 27)
>
> THE COURT: Well, that's another way of saying to the court that the granting of this application possibly will interfere with the vested rights.
>
> MR. HOLMGREN: I think we can demonstrate that there is a difference in contamination in the Boundary Springs, and that's the reason these people want it.

> MR. HOLMGREN: I can make a statement that I think would obviate any testimony at all: that there is a difference in the bacterial count and that the taking of this pure water from the spring tends to increase the bacterial count that is delivered down, and the water that is delivered down would be to us and anybody else who used that water. (R. 27)

On the 6th day of September, 1928, Salt Lake City entered into a contract with the White Ditch Irrigation Company for exchange of water and on other dates, entered into other agreements, (Exhibits 22, 23 and 24) for the exchange of water with the East Mill Creek Water Company and Lower Mill Creek Irrigation Company and without making application for change of place of use, point of diversion or nature of use to the State Engineer's office (as required by Sec. 73-3-3) proceeded to deliver *other water to the ditches* from which the city was to take water, delivered culinary water to the stockholders of the corporation with whom the exchanges were made and also irrigation water from Utah Lake, and in turn, withdrew water from Mill Creek proper including the Boundary Springs and used it at times prior to 1939. The city has not used any of the water from Mill Creek directly since that date and has never at any time made application with the State Engineer to divert the waters of Boundary Springs or to take the Mill Creek water directly into the Salt Lake City water lines.

In harmony with the issues stated on the pre-trial, evidence was offered and received showing the bacterial

count above and below the Boundary Springs (See Exhibits 30 and 31). No reliable conclusions can be drawn from the evidence so offered, and there was no claim made for the present, at least, that Salt Lake City was or can be prejudiced from the granting of the application or by the Decree of the court entered herein.

Complaint is made, however, that the Application No. 70 was made upon the wrong form; that it should have been made upon an application for change of point of diversion and not upon an application for the exchange of water. For the purpose of disclosing the differences in the two forms of application, there was received in evidence Exhibit D. Substantially the same information is called for in each application, and at the end, the application calls for an explanatory statement. There is thus raised a highly technical question as to whether the release to the water users below the Boundary Springs and the intake at defendant's pipeline, of an amount of water equal in quantity to the amount taken out of Boundary Springs, is an exchange of water.

While the Boundary Springs are tributaries of Mill Creek, the flow is not a part of Mill Creek until they reach the channel. Therefore, through the works named in the application, the users were taking the flow above Boundary Springs and the flow of Boundary Springs. After the granting of the application, they were taking no part of the flow of Mill Creek above or below Boundary Springs but are taking the water directly from the Boundary Springs, a tributary, before it in fact be-

comes a part of Mill Creek. We, at this point, call the court's attention to the fact that from the beginning, as disclosed in the testimony of Marvin Taylor, the State Engineer directed the form to be used for the purposes intended and not only provided the exchange form of application, but as indicated, changed the application, in form at least, that was filed. (R. 64-65.)

There was introduced in evidence the rules and regulations of the office of the State Engineer. (Exhibit 18) Paragraph 2, page 1, provides:

> 2. An application received upon an improper or obsolete form, filled out in substantial compliance with the law and accompanied by the proper fee, will be received. However, the applicant shall, upon request of the state engineer, replace it with an application on the proper form and make other necessary corrections within sixty days from the date of its transmittal to the applicant, otherwise the date of priority of the application will be brought down to the date when the application is filed in the proper form.

We turn to a discussion of the points raised by appellant.

STATEMENT OF POINTS

POINT I

THERE WAS PROOF OF AVAILABILITY OF WATER OF LIKE QUALITY AND QUANTITY FOR THE PURPOSE USED AND THE GRANTING OF APPLICATION NO. 70 BY THE STATE ENGINEER WAS PROPER.

POINT II

IT WAS NOT ERROR FOR THE COURT TO AFFIRM THE DECISION OF THE STATE ENGINEER IN APPROVING APPLICATION NO. 70 AND ALL PARTIES CONCERNED HAD PROPER NOTICE OF THE SAID APPLICATION.

POINT III

THE RIGHTS OF THE APPLICANT WERE DESIGNATED IN THE MORSE DECREE AS "HOUSE USE STREAMS" WHICH, LIKE THE APPLICATION INCLUDES STOCKWATERING AND IRRIGATION.

POINT IV

THE TRIAL COURT DID NOT ERR IN DECREEING THAT THE APPLICANT IS ENTITLED TO THE APPROVAL OF HIS APPLICATION AND TO A CERTIFICATE FROM THE STATE ENGINEER GRANTING A PERMANENT RIGHT TO DIVERT UP TO 1.5675 SECOND FEET OF WATER FROM BOUNDARY SPRINGS PURSUANT TO APPLICATION NO. 70 UPON PROPER PROOF OF BENEFICIAL USE.

POINT V

THE DIVERTING OF WATER FROM BOUNDARY SPRINGS UNDER APPLICATION NO. 70 DOES NOT IMPROPERLY MODIFY OR CHANGE THE TERMS OF THE MORSE DECREE.

POINT VI

THE APPROVAL OF APPLICATION NO. 70, WHETHER DEEMED AN EXCHANGE OF WATER OR A CHANGE OF WATER OR A CHANGE OF POINT OF DIVERSION, DOES NOT INVADE THE RIGHTS OF THE APPELLANT OR OF ANY OTHER OWNERS OF RIGHTS TO THE USE OF WATERS OF MILL CREEK.

ARGUMENT

POINT I

THERE WAS PROOF OF AVAILABILITY OF WATER OF LIKE QUALITY AND QUANTITY FOR THE PURPOSE USED AND THE GRANTING OF APPLICATION NO. 70 BY THE STATE ENGINEER WAS PROPER.

Any person entitled to the use of water has a right to change the manner of using it or to exchange it for other water if the proposed change will not interfere with vested rights. Kinney on Water Rights, p. 1538. Even if vested rights will be interferred with, the owner of the water right is entitled to make the change if the order of approval can be made with conditions which will protect other vested rights. Very early in the development of the law of appropriation attempts were made to limit the right to use water to its initial mode of enjoyment. However, the courts and legislatures of practically all of the Western states have held that the

water right is independent of the mode of enjoyment, and that changes may be made in the place of use, the point of diversion, or the mode of enjoyment. This general statement is supported by all the general texts. See "Wiel Water Rights of the Western States," Vol. 1, page 529; "Hutchins Selected Problems in the Law of Water Rights in the West," page 378; "Kinney on Irrigation and Water Rights," Vol. 2, page 1499.

In Utah the right to make a change in the mode of enjoyment of water has been a rather frequent subject of litigation, and it may be considered as settled law that the right to make the change is granted by statute and will only be denied where the change will injure the vested rights of others, and where the order approving the change cannot be so conditioned as to protect those rights. See *Sigurd City v. State,* 105 Utah 278, 142 P. 2d 154; *Tanner v. Humphries,* 87 Utah 164, 148 P. 2d 484.

In *Tanner v. Humphries,* supra, the court had before it a change application and an exchange. The plaintiff applicant was non-suited when he rested. He appealed to the Supreme Court. The court said:

> If the point of diversion may be changed and the exchange made as applied for by the plaintiff without affecting any vested right of the power company, or if a decree can be made containing such conditions as will safeguard the rights of the power company and at the same time permit of the delivery of water for municipal purposes, plaintiff is entitled to have her application granted.

The court then indicated that the burden of proving that the exchange could be made was on the plaintiff, but that:

> * * * it may be that the plaintiff should put in general proof that the change will not injure or disturb vested rights, but if so, it is rather in homage to the general rule that he is required to offer proof in support of all of his allegations, because as a practical matter those who protest will most likely be better situated to know wherein they will be injured than will the plaintiff.

Thus, applicant has a right to make the change unless it will interfere with the City's vested rights, and the City had the general responsibility of demonstrating to the Court the manner in which its rights will be impaired.

It should also be noted that Section 73-3-20, U.C.A. 1953, under which Application No. 70 was filed, provides that exchanges may be granted "but in so doing the original water * * * must not be deteriorated in quality or diminished in quantity for the purpose used." It is respondents' contention that the appellant has made no showing to bring it within that part of the statute as the evidence is conclusive that the present use of the water of Mill Creek is exclusively for irrigation.

The control over the water was effectually assigned to the Boundary Springs Water Users Association by the Articles of Incorporation and by the certificates of stock received in evidence as exhibit 5 and which provided:

> The issuance and acceptance of this certificate shall operate as a transfer to the Boundary Springs Water Users Association of the right to apply to the State Engineer of the State of Utah for a permit to change the point of diversion and use of water owned by the holder of this certificate equal to .01 second feet of water for each share of stock evidenced by the certificate and the transfer of such water shall be and remain irrevocable so long as this certificate is outstanding or until it is cancelled by order of the Board of Directors of the Association.

The essence of appellant's Point I is that the appellant failed to show that it (the corporation) had water available to put into Mill Creek steam in exchange for the water it proposed to take at Boundary Springs. The water of Mill Creek is decreed by the Morse Decree, which was introduced in evidence. An abstract chart showing the conveyance from the decreed owner to the present owner was also admitted in evidence by stipulation to show the various chains of title. The Morse Decree, plus the abstract chart and the list of stockholders, show that the stockholders of Boundary Springs are the owners of decreed water rights in Mill Creek. In addition to the power granted to Boundary Springs by the stockholders, as set forth in the stock certificate, the stockholders who were present testified that they were familiar with the application filed by Boundary Springs, that it was authorized on their behalf to make the application, and that they affirmed and ratified its action. It was stipulated that each other stockholder of Boundary Springs would testify to the same effect as to his decreed

water if he were called as a witness. We, therefore, respectfully submit that Boundary Springs was authorized on behalf of the decreed owners of water to apply for the change described in the application. It was not contradicted that these decreed owners who associated themselves together by forming a mutual non-profit water corporation, proposed to leave the water accruing under their decreed rights in Mill Creek to supply the lower users and to take in exchange therefor a like quantity of water from Boundary Springs.

There is, of course, nothing unusual in the law of water rights for decreed owners to retain the ownership of the water rights themselves while transferring the right to manage, distribute and control to a mutual water company. This practice has been uniformly recognized by the decisions of this court. See, for example, *Genola Town v. Santaquin City,* 96 Utah 88, 80 P. 2d 930, and *East River Bottom v. Boyce,* 102 Utah 149, 128 P. 2d 277.

The objection raised by the City in this regard is purely technical. Technical objections are not looked upon by the courts with favor unless they are timely raised. The City filed a written protest, (see Ex. 14) and appeared before the State Engineer at a hearing to consider the approval or rejection of the application. The City failed to raise any objection at that time to the fact that the application was made by the corporation, rather than by the individual decreed owners. If there were any technical deficiency in this regard (which we deny), it could certainly have been cured at that point.

Further, this point is not raised by plaintiff's complaint, nor was it raised at the pre-trial. We submit that the stipulation to the effect that each decreed owner would testify that he authorized the corporation to make this application, plus the authorization granted by the articles and recited in the stock certificates, are adequate to remove this matter from doubt.

POINT II

IT WAS NOT ERROR FOR THE COURT TO AFFIRM THE DECISION OF THE STATE ENGINEER IN APPROVING APPLICATION NO. 70 AND ALL PARTIES CONCERNED HAD PROPER NOTICE OF THE SAID APPLICATION.

This contention is extremely technical and after full consideration of the question as to whether the exchange form or the application for change of point of diversion form would be the correct form to use, we are convinced that the exchange form was as held by the State Engineer, the correct form. The purpose was to release water from the right of diversion from the main channel of Mill Creek and in turn, to take the same quantity of water from the Boundary Springs before the flow from the Springs became a part of Mill Creek proper. As quoted in the brief for the appellants, the application was made upon blanks furnished by the State Engineer who made minor corrections. The purpose throughout was made perfectly clear and that is all that the law contemplates.

It is contended that the notice, Exhibit 16, was insufficient. The notice names the rights decreed in the Morse Decree and specifies that it is the purpose to divert the water from Boundary Springs and convey it through a pipeline for domestic and stock watering purposes and for incidental irrigation of lawns and shrubs and that water theretofore diverted would remain in the natural channel of Mill Creek to satisfy other rights diverting from Mill Creek. There is no merit whatsoever in Point 2, for if there was error in using the wrong form, it was waived by the State Engineer and by the plaintiff.

The State Engineer, under various sections of Title 73, is empowered to furnish the blanks upon which the various applications are to be made. By the same statutes, applicants are directed to use the blanks furnished by the State Engineer; see, for example, Sections 73-3-2, 73-3-3 and 73-5-13. The statute dealing with exchanges, (73-3-20) merely requires the application to be in writing.

Also, by express statute (73-2-1) the State Engineer has been granted power "to make and publish such rules and regulations as may be necessary from time to time fully to carry out the duties of his office." The rules and regulations of the State Engineer were introduced in evidence as Exhibit 18. Rule 8 provides that applications shall be made only upon the printed forms furnished by the State Engineer. Thirteen separate types of application blanks are thereafter enumerated. Paragraph 2, page 2 then provides:

> An application received upon an improper or obsolete form, filled out in substantial compliance with the law, and accompanied by the proper fee, will be received. However, the applicant shall upon request of the State Engineer replace it with an application on a proper form.

Neither the rules nor the statutes set forth any particular criteria for determining which of the thirteen blanks should be used for a particular purpose. The change and exchange application forms were introduced in evidence at the trial to show the similarity of the information requested. Reference to the photographs introduced in evidence shows that Boundary Springs issue from the bank of the stream, but the water can be successfully captured before it reaches the stream by a concrete wall and drain field, located between the springs and the creek. Whether Boundary Springs and Mill Creek are two separate and distinct sources of water, so that they should be covered by an exchange application, might be debatable. The State Engineer directed that the exchange blank be used. He had the authority to so require under both the statutes and his rules and regulations. The applicant complied with the State Engineer's instructions in this regard. (R. 64-65.)

This is another technical matter raised by the City for the first time during the trial. It was not raised in the written protest filed with the State Engineer, nor at the hearing before the State Engineer, nor in the complaint, nor at the pre-trial. Nor has the City alleged, nor proved how it claims to have been prejudiced by the

use of one blank rather than the other. The City is not in the position of having been mislead by the notice into failing to protest or participate in the proceedings. It did appear in every stage of the proceedings. It fully knew at all times what was proposed.

The City has not shown, nor can it show, any prejudice to it, and it is respectfully submitted that the City is not entitled to prevail on Point II.

POINT III

THE RIGHTS OF THE APPLICANT WERE DESIGNATED IN THE MORSE DECREE AS "HOUSE USE STREAMS" WHICH, LIKE THE APPLICATION INCLUDES STOCKWATERING AND IRRIGATION.

The use of the water decreed under the Morse Decree and the use of the water to be made through the pipeline from Boundary Springs, as stated in Application No. 70, under "Explanatory" and paragraph 12, was for domestic and stock watering purposes. Certainly domestic use in this country would include lawn sprinkling and minor irrigation of garden vegetables, if any, provided an excessive amount of water is not used.

Apparently the City's contention is that because the "house use stream" given by the Morse Decree included the use of the water for irrigation purposes, while the application filed merely specified the use as for "domestic and stock watering purposes," the application could not

be approved. We believe that the application sufficiently reflects that it is the intention to transfer these "house use streams" from Mill Creek to Boundary Springs to the full extent of the 1.5675 c.f.s., decreed rights; and that the water is to be used for household purposes.

The authorities support the concept that "domestic use" is synonymous with "household use" and includes culinary, lawn and garden watering and livestock watering. In *Bountiful City v. DeLuca,* 77 Utah 107, 292 P. 194, at page 119 of the Utah Reports, the Utah Court was considering the meaning of a statute and indicated that the term "use for domestic purposes" includes watering livestock. In "Gould on Waters," Section 205, page 397, Third Ed., it is stated that:

> The term "domestic purposes" extends to culinary and household purposes, to the watering of a garden, and to the cleaning and washing, feeding and supplying the ordinary quantity of cattle. It would appear to extend also to brewing, and the washing of carriages, but it does not include such manufacturing uses as grinding, washing and cooling of rubber.

See also, "Wiel, Water Rights in the Western States," page 798, footnote 22, and "Kinney on Irrigation and Water Rights," Vol. 2, page 1195.

Here again the City raises a highly technical point, which was not presented in its protest to the State Engineer, nor at the hearing before the State Engineer, nor in its complaint, nor at the pre-trial, nor do we remember the matter having been argued at all before the trial

court. Nor does the City now show the manner in which it could be prejudiced in this regard. The quantity of water which the applicant seeks to exchange embraces all of the water decreed to its stockholders by the Morse Decree. It totals 1.5675 c.f.s. The exact manner in which they intend to take and use the water is specified, and is characterized as for "domestic and stock watering purposes." The term "domestic uses" is not defined in the application, but it is used as it has been uniformly used in the administration of water rights in this state to govern all normal and ordinary household uses. It was in this sense that the streams decreed to the applicant's stockholders were characterized by the Morse Decree as "house use" streams, for in Finding 6, the court referred to a "continuous stream for culinary, stock watering, domestic and irrigation purposes, being streams commonly known as house use streams." The application is adequate in this regard, and the court should not in any event look with favor upon technical arguments such as this raised for the first time on appeal.

POINT IV

THE TRIAL COURT DID NOT ERR IN DECREEING THAT THE APPLICANT IS ENTITLED TO THE APPROVAL OF HIS APPLICATION AND TO A CERTIFICATE FROM THE STATE ENGINEER GRANTING A PERMANENT RIGHT TO DIVERT UP TO 1.5675 SECOND FEET OF WATER FROM BOUNDARY SPRINGS PURSUANT TO APPLICA-

TION NO. 70 UPON PROPER PROOF OF BENEFICIAL USE.

The decree of the court, as drafted and submitted, approved and confirmed the issuance of Permit No. 70, and it decreed the right to divert and use up to 1.5675 second feet of water of Boundary Springs pursuant to Application No. 70. Protective provisions are inserted in the decree to the effect that the decreed water would be under the supervision and control of the court commissioner as provided in the Morse Decree, and it was without prejudice to the right of any claimant to the water of Mill Creek to initiate and prosecute a plenary suit or suits for the adjudication of the claims of all water users of Mill Creek, whether claiming under the Morse Decree or otherwise. The court concludes that such issues are not before the court and then the court directs the State Engineer to issue a certificate showing authority to make a change, the certificate to contain a provision to the effect that the granting of the application is without prejudice to vested interest.

The court, of course, without express language, contemplated that proof of the diversion and beneficial use of the water would be made as required by the statute. In other words, we read into the decree the statutory provisions respecting the change of water which are fundamental to all water rights. That is the water must be diverted and beneficially used and proof must be submitted before the right to the use is perfected and a certificate issued.

POINT V

THE DIVERTING OF WATER FROM BOUNDARY SPRINGS UNDER APPLICATION NO. 70 DOES NOT IMPROPERLY MODIFY OR CHANGE THE TERMS OF THE MORSE DECREE.

Every change in the point of diversion or exchange of water to a certain extent modifies pre-existing rights. The rights modified, however, are not with respect to the ownership of the water but only as to the change of point of diversion, change of place of use or exchange of use. Our statutes provide for such changes and every decree that is ever entered has been subject to such subsequent changes. It does not follow, however, that such changes are in any respect prejudicial to other water users.

The City seems to be asserting that once water has been decreed no change application can thereafter be filed, which would to any extent modify the decree. No authority is cited for the proposition, and of course none could be. Most of the water rights in the state are decreed, and change applications are constantly filed and approved. In fact, the statutes contemplate that change applications can only be filed on perfected water rights. Section 73-3-3 limits the making of changes to persons "entitled" to the use of water. Changes by individuals who have not yet perfected their rights are governed by Section 73-3-6. It would serve no useful purposes to cite the numerous cases in which this court has affirmed the approval of change applications where the water

rights involved had already been covered by court decrees. One such example, however, is *Tanner v. Humphries*, supra, 87 Utah 164.

The only other argument made by the City under Point V is that if the water decreed to each particular ditch is diminished, by placing part of it in a pipeline, the remaining water must stand more loss from seepage and evaporation. There is no evidence that there would be *any* loss. It is not true that all ditches lose water. Some ditches are constructed through areas where the ground water is high and the ditches collect water and to a certain extent act as drains. There are also ditches through areas where the ground is so compacted that it is almost impervious to water. Without any evidence to the effect that the water rights remaining in the ditches will be adversely affected, the City is "literally grasping at straws." Further, the city is not the owner of the ditches, or of the right to use water through them. If the City ever exercises the rights which it claims under its exchange applications, the flow of Mill Creek will be placed in a pipeline and taken to Salt Lake City. There is no complaint from any individual who owns any interest in any of these ditches, and the City is not in a position to complain on behalf of the ditch owners.

POINT VI

THE APPROVAL OF APPLICATION NO. 70, WHETHER DEEMED AN EXCHANGE OF WATER OR A CHANGE OF WATER OR A CHANGE OF

POINT OF DIVERSION, DOES NOT INVADE THE RIGHTS OF THE APPELLANT OR OF ANY OTHER OWNERS OF RIGHTS TO THE USE OF WATERS OF MILL CREEK.

Point VI is the only point under which the City has attempted to show that the approval of this application will in any way prejudice it. It asserts that the City has a vested right to have the pure water of Boundary Springs continue to flow into and commingle with the polluted water of Mill Creek, so as to some extent diminish the degree of pollution. Mill Creek is so polluted that the water from it is not fit for human consumption. The City has the power to control the watershed of Mill Creek and stop the sources of pollution. See Section 10-8-15. But it has not seen fit to do so.

Mill Creek Canyon is jammed throughout the summer. There is probably no canyon in the state which is more heavily used for recreational purposes. Numerous picnicing areas and recreational facilities are established and maintained in the Canyon, and the necessary result of this recreational use is pollution of the water supply. (R. 101.)

When the Morse Decree was entered nearly 40 years ago, the people who settled in the mouth of Mill Creek Canyon appropriated the water for their farms and for household uses, and the water was safe to drink. The court recognized this use and decreed to these settlers house use streams. As the development of the canyon

for recreational purposes increased, the water become more and more contaminated and became so bad in 1939 that the City was required to abandon it, because even with chlorination the water could not be made safe. (R. 99, 100.)

The culinary users which made the exchange with the City, have since the date of the exchange in 1923, been supplied and are now being supplied with culinary water by the City, and the City until 1939 took Mill Creek for city use. This involved a change in point of diversion. It also involved a change in place of use. We contend it also involved a change in the purpose or manner of use. The City (although it wants to be extremely technical with us) made this change without attempting to comply with any of the requirements of the Utah statutes. It now comes in and asserts that it is the owner of a "*vested*" right to use Mill Creek for culinary use and to have Boundary Springs commingle with the polluted water of Mill Creek.

The City states in its brief that it intends to install a filtration plant. At times Mill Creek is so polluted that it cannot be brought up to safe standards, even with filtration. This does not frequently happen, and probably with even a token effort by the City to control the watersheds the water could be made fit for human consumption with filtration and complete treatment. It is significant, however, to note that the City did not attempt to show that the water could be rendered

fit for human use if Boundary Springs is left to commingle with Mill Creek, but that the water cannot be rendered fit for human use if Boundary Springs is taken out. Nor did the City attempt to show that the cost of treatment would be increased if Boundary Springs is taken out. The evidence, without conflict, shows that with Boundary Springs left in or with Boundary Springs taken out, the waters of Mill Creek cannot be used for domestic use with simple chlorination. Certainly the very small quantity of water issuing from Boundary Springs, as against the very large quantity of water flowing in Mill Creek, is not going to dilute the pollution to the extent of making any substantial difference to the City if it decides it wants to treat the water.

The City states on page 27 of its brief that "*on the average*" the water is more pure below Boundary Springs than above it. Reference to the exhibits will show, however, that on numerous occasions the water immediately below Boundary Springs is more polluted than the water immediately above. The sources of pollution are so close to the stream that even after Boundary Springs are released into Mill Creek and the pollution is diluted at the point of commingling, within 100 feet below the point of commingling, the water is worse than it was above Boundary Springs. The evidence, therefore, totally fails to show that the City receives any benefit whatsoever from having Boundary Springs commingle with Mill Creek and from having all the water issuing from the canyon polluted.

A more striking example of a "dog in the manger" attitude would be hard to find. The City says, "We admit that Mill Creek is so polluted that we had to abandon its use, because simple chlorination would not render it safe. We would, nevertheless, like the people who reside on the land at mouth of Mill Creek Canyon to use this polluted water, because at some future date the City might want to use the water for culinary purposes." When this future date arrives, if it ever does, the City admits that the waters of Mill Creek must be filtered and completely treated. The City does not contend that this treatment and filtration would be more expensive, more troublesome, or in any way detrimental to the City, because of the fact that Boundary Springs is not commingling with Mill Creek. In fact, every natural implication would be and the exhibits show that the small quantity of water in Boundary Springs commingling with the large quantity of water in Mill Creek in a canyon where the source of pollution is very near the stream, could not have and does not have any material effect on the amount of stream pollution. The Supreme Court in *Tanner v. Humphries,* supra, has laid down the rule that the person claiming that his rights will be prejudiced should show in particular how they will be prejudiced. This, the City has not done. It just relies on the general principle that if you put one gallon of pure water with 100 gallons of polluted water, the degree of pollution in the 101 gallons will be somewhat less. We do not conceive the law to be that the City can prevail simply by showing that there is an infinitesimal effect on the stream.

In "Kinney on Irrigation and Water Rights," Vol. 2, page 1538, it is stated that a change in the manner of using water should be permitted unless the interference with the rights of others is a "*real substantial injury,*" which seriously affects the rights of others; that a mere fanciful trifling injury will not prevent the change. Says Kinney:

> Upon the question of an extent of an injury to the vested rights of others, which must exist before any change is prevented, we will say here that it must be of such a nature that it is a *real substantial injury,* and *seriously affecting* the rights of others. A mere fanciful or trifling injury will not prevent the change.

Kinney also agrees with the general statement from *Tanner v. Humphries,* that the burden rests upon the person claiming injury. On page 538 he states:

> A water right, being a property right of the highest order, its owner may do what he wishes with his own, including the making of such changes as he sees fit to make, provided that he does not materially injure the rights of others in making them. * * * The restriction to the right to make the change that others must not be injured by the change, is a matter of defense; and, therefore, the burden of proof showing that injuries have been done to the rights of others is upon the one seeking damage for injuries actually committed or seeking an injunction. * * * The injury to the rights of others must be proven, as is any other fact, by the party alleging the injury.

The other text writers also speak of "material" or "substantial" interference with the rights of others. See "Hutchins Law of Water Rights in the West," page 378.

Therefore, the fanciful contention of the City that it gets benefit from having Boundary Springs become polluted, so that to some infinitesimal degree the pollution of Mill Creek is diluted, is not a basis for denying the change. Even with the careful testing of the water below and above the springs, as shown by Exhibit 30, 31 and 32, it is difficult to determine any substantial improvement in the water after Boundary Springs commingles with Mill Creek. In fact, on many, many occasions the water is worse below the point of commingling than it was above the point of commingling. The same general principle obtains as to fanciful losses in evaporation or seepage, because there is less water in the ditches. The burden was on Salt Lake City to come forward to show a substantial interference with its rights, because, as Kinney says, the change should be permitted unless there is serious substantial interference and that fanciful and technical injuries will be disregarded.

The plaintiff in this case has instituted and prosecuted a suit that is wholly without equity. It has never itself made application for change of point of diversion or exchange of water or for the right to beneficially use Boundary Springs. The water has flowed continuously into Mill Creek channel and has become polluted to the extent that it is wholly unfit for culinary use. Plaintiff's objection now is based not upon any use or immediate

intention to use the water itself. Having made no application for change of point of diversion, or to change the *place* of use, or to change irrigation water for culinary water, it seeks nothing whatsoever by its complaint. There is reference to a standby use of the water, but the City has done nothing that would make the water available no matter how desperate the situation may be among the residents of the City. There is nothing in the record to indicate that Salt Lake City ever intends to or could utilize the water for the reason that contamination is so great that it would not, without complete treatment, be made fit for consumption. So far as the record discloses, Mill Creek will run in perpetuity as it has been running since the beginning of time and yet the City seeks to prevent the rightful owners of house use streams from diverting the Boundary Springs into a pipeline and thereby saving the water from pollution for their own beneficial uses strictly in accordance with their decreed rights.

FORFEITURE IS NOT A PROPER ISSUE

We do not believe that the question of whether the City has forfeited its water rights is a proper issue. It could not have been decided by the State Engineer. The issues in this court and in the district court are the same as they were before the State Engineer. See *Eardley v. Terry*, 94 Utah 367, 77 P. 2d 362. We do not desire to have this court pass upon that issue. The trial court at the pre-trial indicated that it was not an issue and no evidence was introduced thereon by either party. It

may be that if the City ever attempts to assert its rights in Mill Creek by using it for culinary use, that the applicant will desire to assert this question of forfeiture. We, therefore, do not want the argument of the City to pass unnoted, so that the Supreme Court settles this issue for them by letting them in "through the back door." It is not at all established in the water law of this state that a city cannot forfeit its water rights. Section 73-1-4 certainly so intends, and the only case we are aware of where the issue was presented and decided is *Mt. Olivet Cemetery Assn. v. Salt Lake City,* 65 Utah 193, 235 P. 876, and there the court did hold that Salt Lake City had forfeited its water right. The contention that the City must appropriate water beyond its present needs is adequately taken care of by Section 73-1-4, which permits the cities to obtain a non-use permit. That section expressly provides:

> Such applications for extension shall be granted by the State Engineer for periods not exceeding five years each, upon a showing of reasonable cause for such non-use. Financial crisis * * * or the holding of a water right without use by any municipality, metropolitan water district, or other public agencies to meet the reasonable future requirements of the public, shall constitute reasonable cause for such non-use.

In this case all users of culinary water from Mill Creek, except the stockholders of the applicant, have been getting their culinary water since the 1920's from Salt Lake City. Salt Lake City, without a change application, used the water for culinary purposes in the City

until 1939, but from 1939 until the date of this trial there has been no use whatever of the water for culinary purposes, except by the stockholders of the applicant. Whether any culinary right could be kept alive by irrigation usages is debatable. There is also considerable doubt that the City is the owner of any culinary rights, because it did not file the required applications, and if anybody did assign any culinary rights to the City under the exchange agreements, the quantity is exceedingly small. We, therefore, ask the court not to rule upon this question of forfeiture, because it was not presented to, nor passed upon by, the trial court, and the evidence which would be necessary to an intelligent determination of the issue is not before the court.

THE ISSUE IS: HAS THE BOUNDARY SPRINGS WATER USERS ASSOCIATION THE RIGHT TO A PERMIT TO WITHDRAW PURE CULINARY WATER FROM THE BOUNDARY SPRINGS TO THE EXTENT ONLY OF ITS STOCKHOLDERS' HOUSE STREAM RIGHTS BEFORE IT IS POLLUTED BY COMMINGLING WITH MILL CREEK OR MUST IT STAND BY AND PERMIT THE WATER, WHICH THEY OWN IN PART AT LEAST, TO BECOME POLLUTED TO THE EXTENT THAT IT CANNOT BE USED FOR CULINARY PURPOSES BY ITS MEMBERS.

The court will bear in mind that the house streams, as defined in the Morse Decree, mean the water which the decreed owners had used from time immemorial for culinary and household purposes directly from the creek bed and the various ditches through which it was with-

drawn. Conditions have changed until as disclosed by the record, the water is now polluted to the extent that it is not useable even by chemical treatment.

Salt Lake City, notwithstanding its claim of ownership of irrigation water, has never applied for a permit to change the use or to divert and use Boundary Springs or Mill Creek waters for culinary purposes. Nor has it applied to change the point of diversion or place of use. By the pleadings and the record, the question of dividing of the Boundary Springs water is wholly moot, for no litigant asks for a division, and of course, there being no issue, neither the State Engineer nor the district court could make it. At some future time such an issue may be presented, and the court may then determine it. Further, nearly all of the owners of house use streams are stockholders of the applicant. The total house use streams (both applicant's and third parties') decreed by the Morse Decree will seldom, if ever, exceed the flow of Boundary Springs. If all of the house use stream owners desired to take their water from Boundary Springs it probably would be adequate for all. No one has filed an application to change for that or to change from irrigation to domestic use. Irrigation users certainly can not complain. If all house use stream owners did desire to go to Boundary Springs, other questions may then be presented to the court, such as the right of the users to share equally in the pure water. If change applications are filed by the City to convert irrigation water rights into culinary water rights and to take the water from the Boundary Springs instead of from the

Mill Creek channel, those change applications will be junior to this one. It may be claimed that Salt Lake City, by failing to use the water, has lost it by abandonment. The effect of the prior application of Boundary Springs Water Users Association may be presented.

None of the questions suggested have been put in issue in this case and this application should be approved.

Respectfully submitted,

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